AN OVERVIEW OF THE *EMPLOYMENT EQUITY ACT* (ONTARIO)

Current Issue Paper 143

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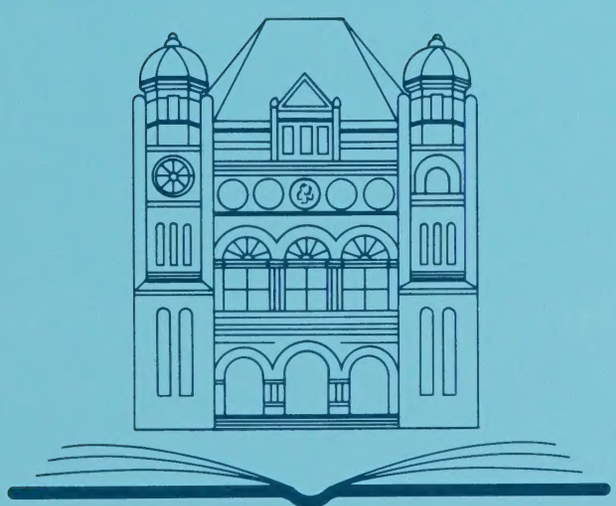

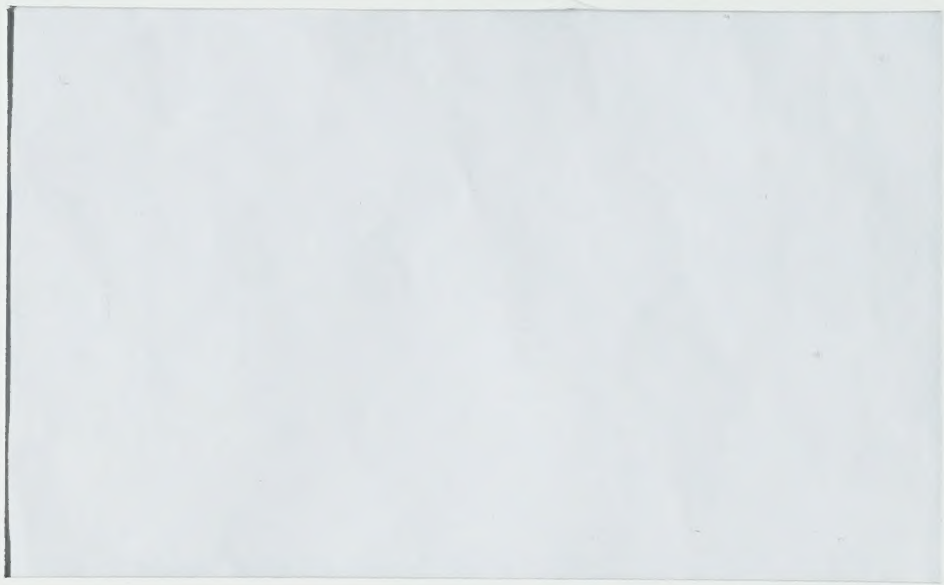

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AN OVERVIEW OF THE *EMPLOYMENT EQUITY ACT* (ONTARIO)

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INTRODUCTION

On September 1, 1994, legislation on employment equity (in the form of a statute and regulations) covering almost three-quarters of Ontario's workforce and involving nearly 17,000 employers, came into force. This Current Issue Paper—one of a series by the Legislative Research Service on employment equity[1]—updates an earlier paper by taking account of amendments made to Bill 79, the *Employment Equity Act*, after second reading as well as regulations issued this year. The paper provides an overview of this legislation, divided into four parts:

- the principles and application of employment equity;
- obligations (primarily on employers);
- administration and enforcement; and
- other issues.

A question-and-answer format is used, with the relevant provisions—whether they be in the *Employment Equity Act, 1993*[2] or the Regulations*—listed next to headings where appropriate. All section references are to the Act, unless otherwise indicated.

As the intention is to provide an overview only, every section and subsection of the Act and the Regulations have not been summarized. For a complete understanding of the legislative provisions, resort should be made to the legislation itself. It should also be stressed that the intention of the paper is to explain, rather than to assess, the content of the legislation.

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*Throughout this paper, "the Regulations" denotes O. Reg. 386/94 ("Aboriginal Workplaces"), O. Reg. 387/94 ("Construction Industry"), O. Reg. 388/94 ("Agricultural Industry"), O. Reg. 389/94 ("Definitions"), and O. Reg. 390/94 ("General").

PRINCIPLES AND APPLICATION OF EMPLOYMENT EQUITY[3]

What are the principles which underlie the Employment Equity Act?

The rationale for the legislation, as stated in the Act, can be found in the preamble and in Part I's formal identification of "employment equity principles."

Preamble

The preamble declares that disadvantage in employment is experienced by the four designated groups—Aboriginal people, people with disabilities, members of racial minorities, and women. More particularly:

- These groups experience higher rates of unemployment than other people in Ontario;
- They experience more discrimination than others in finding and retaining employment, as well as in being promoted. As a result, they are underrepresented in most areas of employment, especially in senior and management positions; at the same time, they are overrepresented in jobs which are low-paying and have little opportunity for advancement;
- The burden imposed on members of these groups and their communities is "unacceptable";
- This lack of employment equity exists in both the public and private sectors in Ontario, and is caused in part by "systemic and intentional discrimination in employment";[4]
- Such discrimination has meant that "people of merit" are too frequently overlooked or denied opportunities; and
- When objective standards govern employment opportunities, the Province will have a truly representative workforce.

The preamble then defines the object of the Act as

> the amelioration of conditions in employment for [the four designated groups] . . . in all workplaces in

> Ontario and the provision of the opportunity for people in these groups to fulfil their potential in employment.

It ends with a statement that the people of Ontario recognize that

- eliminating employment discrimination; and
- increasing the opportunity of individuals to contribute in the workplace

will benefit all people in the Province.[5]

From a constitutional perspective, laws with the object of ameliorating conditions of disadvantaged individuals or groups are protected from an attack based on s. 15(1), the individual equality rights provision, of the *Charter of Rights*. This protection is found in s. 15(2) of the *Charter* which reads:

> Subsection (1) does not preclude any law, program or activity that has as its object the *amelioration of conditions of disadvantaged individuals or groups* including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.[6] [emphasis added]

Employment Equity Principles (s. 2)

The *Employment Equity Act* sets out five broad principles of employment equity which are to apply throughout Ontario. The first two principles hold that

- Every member of a designated group is entitled to be considered for employment, hired, retained, treated, and promoted free of barriers, including systemic and deliberate discriminatory practices and policies; and
- Every workforce, in all occupational categories and at all levels of employment, must reflect the representation of designated group members in the community.

The remaining three principles outline duties of employers as follows:

- Every employer must ensure that its employment policies and practices, including those with respect to recruitment, hiring, retention, treatment, and promotion are free of systemic and deliberate barriers that discriminate against designated group members;

- Every employer must implement *positive measures* for recruiting, hiring, retaining, treating, and promoting designated group members; and

- Every employer must implement *supportive measures* in the same areas as above, but "which also benefit the employer's workforce as a whole."

  (Examples of "positive" and "supportive" measures are provided below under "Content of Plan: The Regulations".)

Entitlements (s. 1)

Prior to listing these principles, the Act states that members of the designated groups are "entitled to be considered for employment, hired, retained, treated and promoted in accordance with employment equity principles". S. 1 also restates and adopts principles set out in the *Human Rights Code*[7] by recognizing the entitlement of "all people" to equal treatment in employment in accordance with the *Code*.

How is membership in a designated group defined? (O. Reg. 389/94, ss. 1-4)

The Regulations define the designated groups, other than "women", as follows:

- Aboriginal people—persons who are members of the Indian, Inuit, or Métis peoples of Canada;

- people with disabilities—persons with a persistent impairment (physical, mental, psychiatric, sensory, or learning) who, by reason of that impairment

  - consider themselves to be disadvantaged in employment; or

  - believe that an employer or potential employer is likely to consider them to be disadvantaged in employment;

- members of racial minorities—persons who because of their race or colour are in a visible minority in Ontario. The fact that a person is an Aboriginal person does not make that individual a member of a racial minority.

The Regulations further stipulate that a person may be a member of more than one designated group. For instance, Aboriginal women, women with disabilities, and women who are members of racial minorities, are also members of the designated group "women".

From a comparative perspective, the regulation on employment equity plans made under the *Police Services Act*[8] provides for the same designated groups (known as "prescribed groups"), but defines two of the groups differently, as illustrated by the following:

- persons with disabilities—persons with a permanent condition (physical, mental, or medical) that limits them in the kind or amount of activities of daily living and work they can do;
- members of racial minorities—persons, other than aboriginal persons, who because of race or colour, are in a visible minority in Canada that is non-Caucasian in race or non-white in colour.[9]

Which employers are bound by the Act?

Categories of Employer (s. 3)

The Act identifies three categories of employers:

- **the Crown in right of Ontario**, which is considered to be the employer of the Ontario Public Service;
- **the broader public sector.** This term is defined to mean the employers named in the Schedule to the *Pay Equity Act*[10] (such as municipalities, school boards, colleges, universities, hospitals, and boards of health), plus any other employers designated in the regulations. No further employers have been so designated; and
- **the private sector employer.** This term means any employer other than those falling under the two categories listed above.

The Office of the Legislative Assembly and Members of the Assembly are named in the Schedule to the *Pay Equity Act* and accordingly are considered to be part of the broader public sector.

Application of Act (ss. 3(5), 7)

The application of Parts III—*Obligations*, IV—*Enforcement*, and VI—*Miscellaneous and Regulations* varies, depending on the employer in question. The general rule is that these Parts apply to all employers in Ontario, except for employers in the broader public sector who have fewer than 10 employees and private sector employers who have fewer than 50 employees. (Also excluded are federally-regulated employers—for instance, banks.)

By way of comparison, Bill 172, the *Employment Equity Act, 1990*—a private member's bill introduced by Bob Rae in May 1990 prior to becoming Premier—would have applied to all employers in the private and public sectors with an annual payroll of more than $300,000.[11]

Are there any exemptions for those employers bound by the Act?

Aboriginal Workplaces
(s. 22(1); O. Reg. 386/94; O. Reg. 389/94, s. 6)

The Lieutenant Governor in Council may, by regulation, vary the application of any of the provisions of Part III and the regulations as they apply to Aboriginal workplaces.

In June 1992 the Office of the Employment Equity Commissioner commented in *Opening Doors: A report on the Employment Equity Consultations* that aboriginal participants felt that they had benefitted most from programs designed by and for them. The report continued:

> The principle of employment equity had the support of Aboriginal participants provided that it is developed in a manner consistent with the goals of self-government. It must reflect a holistic approach addressing issues of education, training, social and economic development and cultural identity. It must serve to help strengthen Aboriginal communities and further Aboriginal self-government. It therefore must be created by Aboriginal people, for Aboriginal people, in partnership with government.[12]

Two years later, upon the release of the Regulations on employment equity, the Ministry of Citizenship noted that discussions were still being held between government officials and representatives of Aboriginal organizations regarding the application of employment equity to Aboriginal workplaces. The Ministry explained that

> To allow time for these discussions to continue, and to develop a special regulation for these workplaces in keeping with the Statement of Political Relationship [of August 1991], the effective date of the legislation for Aboriginal workplaces is delayed for a one-year period.[13]

The general regulation on employment equity (O. Reg. 390/94) does not apply to Aboriginal workplaces.**

"Small Employers" in the Broader Public Sector and Private Sector

(s. 22(2)-(5); O. Reg. 390/94, ss. 2(1), 11(1), 14(1),(2), 17(4), 24(3), 37(1),(2), 39(3), 40(3))

The *Employment Equity Act* also says that the regulations may provide certain exemptions to broader public sector employers with fewer than 50 employees, and private sector employers with fewer than 100 employees. Such exemptions may apply to any provision of Part III and the regulations. In addition, the regulations may impose less stringent requirements on these employers (who are categorized in the Regulations as "small employers").

**It also does not apply to the construction industry. O. Reg. 390/94 s. 1. A separate regulation excludes seasonal agricultural workers from the application of Parts III-VI of the Act. O. Reg. 388/94, s. 2.

What is the time frame for complying with the Act? (ss. 23, 24)

The Act prescribes certain timelines within which employers must have completed their initial workforce surveys and employment systems reviews, and prepared their first employment equity plans. These timelines differ, depending on the category and size of employer, and are found in Table 1 under the heading "Implementation".

Table 1 also summarizes the above information on the application of the *Employment Equity Act*, including the exemptions for parts of the broader public sector and the private sector.

OBLIGATIONS

Part III of the Act defines the obligations of employers. These obligations encompass both the substance of employment equity as well as the process and are briefly outlined below.

Does the Act impose any general obligation upon employers to implement employment equity? (s. 9(1))

Yes. Part III begins by defining the general obligation of every employer to implement and maintain employment equity by recruiting, hiring, retaining, treating, and promoting employees in accordance with employment equity principles and the relevant employment equity plan.

TABLE 1
APPLICATION AND IMPLEMENTATION OF EMPLOYMENT EQUITY ACT

EMPLOYER	APPLICATION OF PARTS III, IV, AND VI	EXEMPTIONS	IMPLEMENTATION (surveys and reviews completed; plans prepared)
Ontario Public Service	yes	no	September 1, 1995
Broader Public Sector (50+ employees)	yes	no	March 1, 1996
Broader Public Sector (10-49 employees)	yes	yes, by regulation (permissive)	March 1, 1996
Broader Public Sector (1-9 employees)	no	N/A	N/A
Private Sector (500+ employees)	yes	no	March 1, 1996
Private Sector (100-499 employees)	yes	no	September 1, 1996
Private Sector (50-99 employees)	yes	yes, by regulation (permissive)	September 1, 1997
Private Sector (1-49 employees)	no	N/A	N/A
Ontario Provincial Police or any other police force governed by s. 48 of *Police Services Act**	no	N/A	N/A

N/A = not applicable

*Municipal police forces and the Ontario Provincial Police must prepare employment equity plans in accordance with s. 48 of the *Police Services Act* and the regulations under that Act.

What obligations do employers have to survey their workforces, and to review their employment policies and practices? Apart from any survey requirements, what records must be kept?

Workforce Surveys and Recordkeeping

(ss. 10, 19; O. Reg. 390/94, ss. 6-13, 37-38)

Every employer must conduct employment equity workforce surveys and collect other information to determine the extent to which members of the designated groups are employed in the employer's workforce. Such surveys are to be carried out in accordance with the regulations. The principle of voluntary self-identification is recognized through the right of an employee to decide whether to answer questions contained in the survey. Under the Regulations, a new survey must be conducted every nine years.

There is a separate obligation on employers to establish and maintain employment equity records for the workforce. Information in the records that concerns an employee's membership in a designated group must have been provided by the employee only.

Employment Systems Review

(s. 11; O. Reg. 389/94, s. 5; O. Reg. 390/94, ss. 14-15)

All employers must review their employment policies and practices in accordance with the regulations. The purpose of the review is to identify barriers to the recruitment, hiring, retention, treatment, and promotion of members of the designated groups, including terms and conditions of employment that adversely affect these employees. The review is also designed to enable the employer to remove such barriers.

The Regulations state that a policy or practice is a barrier "if it directly or indirectly adversely affects persons who are members of a designated group more than it affects others."[14]

Examples of possible barriers provided by the Ministry of Citizenship are

- height and weight restrictions that tend to exclude women and certain racial minorities and that are unrelated to the job;
- physical barriers to wheelchair access to the workplace; and
- making Canadian experience a job requirement when the work does not require it.[15]

What must be included in an employment equity plan?

Content of Plan: The Act
(ss. 12(1),(2), 13, 55(2))

General

Every employer must prepare an employment equity plan that contains goals and timetables for the implementation of employment equity. More specifically, the plan must provide for

- the elimination of the barriers identified during the employment systems review;
- the implementation of positive measures with respect to the recruitment, hiring, retention, treatment, and promotion of members of the designated groups;
- the implementation of supportive measures in the same areas as above, but "which also benefit the employer's workforce as a whole";
- the implementation of measures to accommodate members of the designated groups in the employer's workforce;
- specific goals and timetables for all the above matters;
- specific goals and timetables with respect to the composition of the employer's workforce; and
- any other matters prescribed by the regulations. (See "Content of Plan: The Regulations" for examples of such matters.)

More Than One Plan

An employer may prepare more than one plan in accordance with the regulations. However, each plan must meet the requirements just listed. As well, the plans together must cover all of the employees in all of the employer's workplaces.

The Regulations state that where more than one plan is prepared, the plans individually and together must not defeat the principles of the Act.

Standard re: Contents of Plan

Every employer must ensure that if the matters contained in the plan were implemented, there would be "reasonable progress toward achieving compliance with the principles of employment equity" set out in s. 2.

Numerical Goals and Regulations

The Act furthermore says that a regulation governing the content of plans may require plans to contain numerical goals to be determined in a specified manner. In particular, a regulation may provide that goals shall be determined

> with reference to percentages approved by the [Employment Equity] Commission that, in the opinion of the Commission, fairly reflect the representation of the designated groups in the population of a geographical area or in any other group of people.[16]

Concept of Numerical Goals

In *Opening Doors* the Office of the Employment Equity Commissioner noted that "there was strong consensus that both numerical and qualitative goals are necessary to achieve employment equity."[17] The Office gave its understanding of the difference between goals and quotas:

> There is a difference between numerical goals and quotas. Numerical goals are flexible because they are determined according to several criteria, including opportunities for hiring and promotion in the workplace. The failure to achieve a goal does not automatically result in a penalty. Quotas, by contrast, usually are fixed numbers, externally imposed, with an automatic penalty if the quota is not met.[18]

Bill 172, the *Employment Equity Act, 1990*, was similar to the 1993 Act in that it also incorporated the concept of numerical targets. It would have required every employer to develop an employment equity plan designed (1) to remove employment barriers; and (2) to achieve a fair representation of members of designated groups throughout occupational categories, to a degree that was at least proportional to the working age population of the region.[19]

Content of Plan: The Regulations

(O. Reg. 390/94, ss. 16-19, 21)

General

The Regulations stipulate that every plan must contain certain information, including a description of the measures that will be implemented during the term of the plan. As well, in the case of employers other than "small employers", the plan must set out numerical goals. These requirements are outlined below.

Measures and Other Information

The kinds of measures which must be included in a plan under the Regulations have been explained by the Ministry of Citizenship as follows:

> [They] include:
>
> - **action to eliminate barriers**—for example, eliminating height and weight requirements unrelated to the job

- **positive measures** to help members of designated groups secure equitable treatment in the workplace—for example, mentoring or bridging programs

- **ways to accommodate**—for example, providing a work-related technical device that would enable a person with a disability to do the job

- **supportive measures** that benefit all employees—for instance, flexible working hours

- **anti-harassment policies** and **anti-discrimination policies** that would improve the working environment for all employees.[20] [emphasis in original]

Plans must also list the barriers that will be eliminated during the current and subsequent plans. In addition, in the case of employees who are not represented by a bargaining agent, the plan must

- describe the employer's consultations with the employees on employment equity;

- summarize the employees' comments; and

- describe how the employer has addressed the concerns that were raised.

Numerical Goals

With the exception of small employers, the plan of every employer must state a numerical goal for each designated group in each occupational group in the workforce covered by the plan.[21] (There is a total of 14 occupational groups.[22]) If the employer operates in various locations in Ontario, separate numerical goals must be set for each geographic area covered by the plan.

A numerical goal is defined as the "proportion of job openings" in an occupational group that an employer targets for members of the designated groups. "Job openings" include hirings and promotions, plus transfers from one occupational group to another.

In setting numerical goals, employers must consider the following factors:

- **Under-representation:** This factor involves a comparison of (1) the proportion of designated group members in each occupational group; and (2) their representation in the working age population of the geographical area;

- **Internal Availability:** This category refers to the number of designated group members already working for an employer who have the skills for, or who could be trained for, job openings;

- **External Availability:** In general, this factor refers to the number of qualified designated group members outside the organization. On a more specific level, in determining external availability employers must look at the proportion of designated group members among people who

  - are in the working age population in the geographical area;

  - are in the occupational group in the geographical area;

  - have the necessary skills to work in the occupational group in the geographical area;

  - are graduating from educational and training programs in Ontario that give them the required job skills;

  - are in any other group for which the Employment Equity Commission provides data.

  For some occupations, it may be the usual practice to recruit persons from a larger geographic area than the particular area where the employer is located. In such cases, the population group for the larger area may be used for certain calculations. The Ministry of Citizenship has noted that

  > For example, some organizations may regularly search across the province for candidates in very specialized scientific careers. In this case, data from the larger geographic area may be used to compute the number of people already working in the occupational group or having the skills to do so.[23]

As mentioned earlier, a separate Ontario regulation on employment equity plans has been made under the *Police Services Act*. This regulation provides for the setting of composition, hiring, and position goals, as well as goals for the elimination of barriers

and for positive measures.[24] In general, a composition goal is determined in accordance with the principle that the percentage of "prescribed group" members employed in the police force should equal their representation in the community, subject to hiring opportunities.[25]

Is there any requirement to file a plan or report on its implementation? If so, with whom?

Certificates

(ss. 12(3)-(7) and 55(1)18; O. Reg. 390/94, s. 24)

In general, employers are required to file plan certificates, but not the plans themselves, with the Employment Equity Commission. The certificate must basically confirm that the legislative requirements have been met;[26] include statistics on the workforce profile; and inform the Commission as to where it can obtain a copy of the employer's full report on the plan. (Reports are discussed below.)

There are three exceptions to this general requirement to file certificates instead of plans, as follows:

- The Crown in right of Ontario must file a copy of its plan with the Commission;
- Employers or classes of employers in the broader public sector may be required by regulation to file copies of their plans with the Commission;
- The Commission may require an employer to file a copy of a plan.

With regards to the certificate itself, there are special statutory and regulatory requirements applicable to every employer other than a "small employer". In the case of these "non-small" employers, the certificate must contain information with respect to the provisions of the plan in accordance with the regulations

- for the elimination of barriers;
- for the implementation of positive measures;

- for the implementation of supportive measures; and
- for the implementation of measures to accommodate members of the designated groups.

Reports

(ss. 20, 21; O. Reg. 390/94, ss. 39-41)

Every employer must also submit reports and other information, as prescribed by regulation, to the Commission on

- the composition of the employer's workforce; and
- the development, implementation, review, and revision of the plans.

The Regulations expressly require the following employers to submit their reports to the Commission:

- the Crown in right of Ontario; and
- "designated employers in the broader public sector"—that is, municipalities, universities, colleges, school boards, and hospitals—with 50 or more employees.

Most employers, then, must keep their reports on file and send them to the Commission only on request.[27]

Information provided to, and in the possession of, the Commission may be the subject of an application for access by "any person".

What efforts must an employer make to implement a plan? (s. 14; O. Reg. 390/94, s. 17(1))

Once a plan has been developed, an employer must make all reasonable efforts to implement it, and to achieve the plan's goals in accordance with the timetables set out in it. The Regulations require plans to set out a monitoring process.

How long is a plan in effect? Must plans be reviewed and revised? *(s. 15; O. Reg. 390/94, ss. 20, 22-24)*

Plans are in effect for three years and must be reviewed and revised by employers in accordance with the regulations. As well as meeting the requirements for an original plan, a revised plan must indicate which numerical goals, if any, in the preceding plan were not achieved. If a goal was not met, it must describe the measures to be developed and implemented to address the matter.

The same filing requirements apply to these revisions as to the original plans—that is, subject to some qualifications, certificates respecting the revised plans, but not the plans themselves, must be filed with the Employment Equity Commission.

The certificate must confirm that the previous plan has been reviewed and revised, and that the employer has prepared the necessary end-of-plan report. It must also include a comparison of the workforce profile at the beginning of the current plan with the profile three years earlier.

What provision does the Act make for the participation of employees in the employment equity process? For instance, what information must employers provide to their employees?

Duty to Inform
(s. 18; O. Reg. 390/94, ss. 34-36)

All employers must post in prominent places in their workplaces

- a copy of each plan certificate that the employer has filed with the Employment Equity Commission; and
- such other information about the Act and employment equity as may be prescribed by the regulations.

The Act, then, does not require the plan itself to be posted. However, employers must "make available" in each of their workplaces a copy of each plan.[28] Both the

posted information—more technically, the places where it is posted—and the plans must be accessible to all the employees to whom they apply.

Employers also have a general duty to make information available to their employees in respect of the Act and employment equity, in accordance with the regulations. Among other things, the Regulations require employees to be informed about the principles of employment equity before any steps are taken under the Act. Another requirement holds that employment equity reports and relevant orders of the Employment Equity Tribunal or Commission must be posted, provided, or made available to employees.

Training of Supervisory and Human Resources Staff

(s. 9(2), (3))

An employer must ensure that those responsible for recruiting, hiring, supervising, evaluating, or promoting employees are aware of and comply with the Act, the regulations, and the relevant employment equity plan. Such individuals are specifically directed to work in accordance with the Act, the regulations, and the plan.

Consultation: No Bargaining Agent

(s. 17; O. Reg. 390/94, ss. 31-33)

Employers must consult with their unrepresented employees—that is, those employees not represented by a bargaining agent—on the following matters in accordance with the regulations:

- the conduct of the workforce survey;
- the employment systems review; and
- the development, implementation, review, and revision of the relevant employment equity plan.

Bargaining Agent

In the case of employees represented by a bargaining agent, the employer has the responsibilities discussed under the next question.

What obligations exist when a bargaining agent, such as a union, represents any of the employer's employees?

Joint Responsibilities

(s. 16(2),(5); O. Reg. 390/94, ss. 6(4)-(6), 11(4), 12(3), 13(3), 14(4)-(6), 15(2), 16, 22(5), 25-30, 34(6))

Where a bargaining agent is present, the employer and the agent must jointly carry out the responsibilities regarding

- workforce surveys;
- employment systems reviews;
- employment equity plans;
- the standard for the contents of plans; and
- reviews and revisions of plans

in respect of the part of the workforce represented by the bargaining agent.

These joint responsibilities are to be carried out in good faith, separately from the normal collective bargaining process, and in the manner prescribed by the regulations.

Case of More than One Bargaining Agent

(s. 16(3),(4); O. Reg. 390/94, ss. 25(2), 26-27)

Where employees are represented by more than one bargaining agent, the employer and the bargaining agents must establish a committee to co-ordinate the carrying out of their joint responsibilities. The committee is to be composed of representatives of the bargaining agents and up to an equal number of employer representatives, in accordance with the regulations.

Right to Information
(s. 16(6),(7); O. Reg. 390/94, s. 29)

An employer must provide the bargaining agent with all the information in its possession or control that meets the following two conditions:

- the information is in respect of the part of the workforce in which employees are represented by the bargaining agent; and
- the information is necessary for the agent's effective participation in the joint responsibilities process. Such information may be prescribed by regulation.

The employer, however, need not provide "information of a scientific, technical, commercial, financial, personal or other nature" if disclosure

- could reasonably be expected to prejudice the employer's competitive position; or
- meets the criteria set forth in the regulations.

Disputes (s. 30)

Permissive and Mandatory Applications

Where an employer and bargaining agent are unable to resolve any matter that is their joint responsibility, either may apply to the Employment Equity Tribunal at any time to determine the matter. The employer, however, must promptly apply to the Tribunal if the parties have not carried out their joint responsibilities within the time required under Part III.

Orders of Tribunal

On these applications, the Tribunal may make any order it considers just in respect of the part of the workforce represented by the bargaining agent.

What significance does the Act attach to seniority rights?
(s. 11(3), (4))

The Act distinguishes between two kinds of seniority rights, both of which must have been acquired through a collective agreement or an established practice of an employer. The two categories are

- seniority rights with respect to a layoff or recall to employment; and
- other seniority rights.

The former are deemed explicitly not to be barriers to the recruitment, hiring, retention, treatment, or promotion of members of the designated groups. The latter are also deemed not to be barriers, unless

> a board of inquiry under the *Human Rights Code* finds that the seniority rights discriminate against members of a designated group in a manner that is contrary to the *Human Rights Code*.

In 1992 in *Opening Doors* the Office of the Employment Equity Commissioner had commented that seniority provisions were not designed to discriminate. However, until designated group members were fairly represented in the workplace, seniority might have a discriminatory effect on these groups.[29] The Office had concluded that

> Where the practice of seniority is found to be a systemic barrier, it should be eliminated and alternate and complementary forms of seniority should be negotiated. In matters of lay-off and recall, seniority can be practised in ways that reduce the impact on designated group members, such as implementing voluntary inverse seniority with compensation, job sharing or rotational lay-offs.[30]

The report continued that many unions, such as the Canadian Auto Workers, the United Steelworkers of America, and the Ontario Public Service Employees Union had developed seniority clauses which took into account employment equity objectives.[31]

What happens if an employment equity plan and a collective agreement are in conflict? *(s. 6)*

An employment equity plan prevails over all relevant collective agreements to the extent of any inconsistency.

ADMINISTRATION AND ENFORCEMENT

What is the composition of the Employment Equity Commission? *(s. 45)*

The Employment Equity Commission is composed of one or more members to be appointed by the Lieutenant Governor in Council (LGC). The LGC must also designate one member as the Employment Equity Commissioner.

What enforcement powers does the Commission have? *(ss. 25-27)*

The Commission has three broad enforcement powers:

- **audit:** it may audit an employer to determine whether the employer is complying with Part III. The audit power extends to the obtaining of search and entry warrants;

- **settlement:** where it is of the opinion that an employer may not be complying with Part III, the Commission may endeavour to effect a settlement;

- **order:** the Commission may, without a hearing, order an employer to take specified steps to achieve compliance with Part III, if it considers that any of eight prescribed circumstances exist. These circumstances include failure to conduct the workforce survey or employment systems review, failure to make available in the workplace a copy of the relevant employment equity plan, and preparation of a plan which does not comply with the statutory requirements.

  An order may be appealed by an employer to the Employment Equity Tribunal where it may be rescinded, varied, or confirmed. (The composition and powers of the Tribunal are discussed below.)

What other functions does the Commission perform?

General (ss. 46, 49)

Some other functions of the Commission are:

- to further the principles of employment equity;
- to monitor the implementation of employment equity and the effectiveness of the Act;
- to conduct research and develop policy in relation to employment equity;
- to assist employers, employees, and bargaining agents in complying with Part III;
- to educate the public about employment equity; and
- to make an annual report on its activities to the Minister of Citizenship. The report must include data and information on the progress toward achieving employment equity in Ontario.

Policy Directives (s. 47)

The Commission may issue policy directives on matters related to employment equity. These directives must be considered by the Employment Equity Tribunal in making decisions.

Advisory Councils (s. 50)

The Minister of Citizenship may appoint one or more advisory councils to advise the Commission. An advisory council must include

- a representative of employers;
- a representative of labour; and
- a representative of the designated groups.

Applications to the Employment Equity Tribunal (ss. 28, 36(2))

As discussed below, the Commission may make applications to the Employment Equity Tribunal. It is also entitled, at its request, to be a party to any other application.

What is the composition of the Employment Equity Tribunal?
(ss. 51-52)

The Tribunal is composed of such members as are appointed by the Lieutenant Governor in Council. One member must be designated by the LGC as the chair.

The chair may appoint panels to conduct hearings; a decision of a panel (which is composed of one or more members of the Tribunal) is a decision of the Tribunal.

Who may apply to the Tribunal, and under what circumstances?
(ss. 28-35)

Applications may be brought to the Tribunal by: the Commission; any person; an employer; a bargaining agent; or an employee. Table 2 outlines the reasons for which each applicant may apply to the Tribunal.

Every application must be referred to a Tribunal employee "who may endeavour to effect a settlement." If the employee considers that mediation will not resolve the application, the Tribunal must hold a hearing and determine the application, unless otherwise provided by regulation.

Despite this general hearing requirement, the Tribunal may without a hearing decide not to deal with an application if it appears that

- the subject-matter of the application is trivial, frivolous, vexatious or made in bad faith; or
- the application is not within the Tribunal's jurisdiction.

TABLE 2
APPLICATIONS TO THE EMPLOYMENT EQUITY TRIBUNAL

APPLICANT	REASONS FOR APPLICATION
Employment Equity Commission *(s. 28(1))*	• determination of whether employer has complied with Part III.
Any Person *(ss. 29(1), 33(1))*	• employer has failed to take steps required by an employment equity plan; • employer has failed to achieve goals set out in a plan in accordance with timetables; • employer has failed to implement settlement; • another person has intimidated, coerced, penalized or discriminated against applicant contrary to s. 42.
Employer *(ss. 30(1), (2), 32(1))*	• employer and bargaining agent have not resolved any matter that is their joint responsibility; • employer and bargaining agent have not carried out their joint responsibilities within the time required under Part III—an application to Tribunal by employer is mandatory; • declaration that employer and one or more other employers constitute single employer.
Bargaining Agent *(ss. 30(1), 32(1))*	• employer and bargaining agent have not resolved any matter that is their joint responsibility; • declaration that employer and one or more other employers constitute single employer.
Employee *(ss. 31(1), 32(1))*	• employer and bargaining agent are not carrying out their joint responsibilities in good faith; • employer has not applied to Tribunal when required to do so; • declaration that employer and one or more other employers constitute single employer.

There are specific procedural rules governing instances where an employer is party to an application before the Tribunal and the subject of a Commission audit at the same time.

In the case of an application to the Tribunal, what relevance is attached to an employer's efforts to implement an employment equity plan?

The Act explicitly recognizes the importance of "reasonable efforts" where applications have been made by the Commission or any person. As explained below, reasonable efforts by the employer can be part of a defence to "deemed" non-compliance with Part III.

Applications by the Commission (s. 28(2))

Where the Commission has made an application to the Tribunal, the employer is "deemed" not to have complied with Part III if the employer

- has failed to take steps required by an employment equity plan; or
- has failed to achieve the goals set out in a plan in accordance with the plan's timetables.

"Deemed" non-compliance, however, will not take place if the employer proves that

- the plan complies with Part III; and
- the employer made all reasonable efforts to implement the plan and to achieve its goals in accordance with the timetables.

Applications by Any Person (s. 29(2))

The same defence (i.e. Part III compliance and reasonable efforts) is available to an employer where a person's application alleges a failure to achieve the goals set out in a plan in accordance with the timetables.

What kind of decision-making powers does the Tribunal have?

(ss. 31(2), 32(3), 33(3), 37, 38)

In any application, the Tribunal may make such orders as it considers just, including any of the following:

- an order establishing or amending an employment equity plan;
- an order requiring an employer to create an employment equity fund to be used as specified in the order; and
- an order appointing an administrator who, at the employer's expense, is responsible for developing, implementing, reviewing, and revising an employment equity plan.

In addition to amending an employment equity plan as above, the Tribunal may amend a collective agreement. However, it may only do so if it considers that other orders are not sufficient in the circumstances to ensure compliance with the Act.

In the case of an application by an employee (other than for a declaration re: single employer) or by a person alleging intimidation (the offence of intimidation is outlined below), the Tribunal's power to "make any order it considers just" is specifically defined to include such things as:

- removing or modifying a term in an employment equity plan that in the Tribunal's opinion was not included in good faith (employee application);
- requiring the payment of compensation to the applicant (application re: intimidation).

A further decision-making power applies when a declaration is sought that two or more employers constitute a single employer for the purposes of the Act. Such an order may be made when three conditions are satisfied, one being that the employers carry on related activities under common control or direction.

The Tribunal also has a reconsideration power—that is, when considered advisable, it may reconsider any decision or order and vary or revoke it. Otherwise, decisions or

orders of the Tribunal are final and conclusive for all purposes.[32] (Other powers of the Tribunal—specifically, its powers on an appeal from a Commission order—were discussed earlier.)

What offences does the Act create? What penalties may be imposed? (ss. 39-44)

Offences under the bill include:

- disclosing information collected from employees under Part III, except for the purpose of complying with Part III or IV;
- obstructing a Commission employee in the execution of a warrant or impeding an employee in the course of an audit;
- knowingly providing false information on a certificate that is filed with the Employment Equity Commission;
- intimidating, coercing, penalizing, or discriminating against another person because that person, among other things
  - is exercising a right under the *Employment Equity Act*;
  - is participating in a proceeding under the Act; or
  - has sought the enforcement of the Act or an order.

  If an application is made to the Tribunal on the grounds that this offence has been committed, the person against whom the complaint is made has the burden of proving that he or she did not do so;
- failing to comply with an order of the Tribunal.

The prosecution of an offence requires the written consent of the Tribunal. Upon conviction, the offender faces a maximum fine of $50,000.

OTHER ISSUES

Does the Act incorporate a "contract compliance" model of employment equity? (s. 54)

Yes. It is a condition of every government contract, grant, contribution, loan or guarantee that every other party to the arrangement must comply with Part III to the extent of its obligations under that Part.

The Act then defines what constitutes "conclusive proof" of a breach of this condition. Such proof lies in a finding by the Employment Equity Tribunal that Part III has been breached. The breach entitles the government to cancel the contract, grant, contribution, loan or guarantee and to refuse to enter into any further such arrangement.

How does the Employment Equity Act interact with the Human Rights Code?

Two ways in which the *Employment Equity Act* makes reference to the *Human Rights Code* are:

- by amending the *Code* directly; and
- by stating that certain conduct under the *Code* does not constitute a breach of the Act.

Amendments to the Code (s. 56)

Non-Infringement of a Right under Part I

The basic right against discrimination in employment is found in s. 5(1) of the *Human Rights Code* which reads

> Every person has a right to equal treatment with respect to employment without discrimination because of race,

> ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status or handicap.

The Act says that "positive measures" and "numerical goals" do not violate this right when restricted to members of the designated groups. In particular, it amends the *Code* to state that

> 14.1 (1) A right under Part I [which includes s. 5(1)] is not infringed because positive measures or numerical goals that are contained in an employment equity plan under the *Employment Equity Act, 1993* are restricted to members of the designated groups identified under section 4 of that Act.

Assessment of Undue Hardship

Another (and somewhat complicated) amendment to the *Code* applies when the following two conditions are satisfied:

- a complaint is made against an employer that has an employment equity plan; and
- the Human Rights Commission, a board of inquiry or a court has to make an assessment of undue hardship under ss. 11(2) [constructive discrimination], 17(2) [accommodation and handicap], or 24(2) [accommodation and special employment] of the *Code* with respect to the complaint.[33***]

Generally, under these circumstances, the cost of implementing the plan may be considered by the Commission, board, or court. However, the cost must be considered in any assessment of undue hardship if, as of the day the complaint is filed with the Commission

- the Employment Equity Tribunal has determined that the plan complies with Part III of the *Employment Equity Act, 1993*; or
- the Employment Equity Commission has made this determination.

***These sections are reproduced in the footnotes.

Orders re: Employment Equity Plans

A further amendment to the *Code* stipulates that the Human Rights Commission or a board of inquiry cannot make an order amending an employment equity plan under the *Employment Equity Act, 1993*. There is a qualification, however, if a board of inquiry finds that a Part I right of a complainant has been infringed by an employer that has a plan; in such a case, the board may make an order that has the "effect" of imposing requirements on the employer that are additional to those contained in the plan.

Applicability of Exceptions under the Human Rights Code (s. 5)

The *Code's* right to equal treatment in employment is subject to various exceptions. For instance, s. 11 of the *Code* on constructive discrimination[34] makes an exception where the qualification in question is reasonable and *bona fide* in the circumstances—in such cases, the right against employment discrimination is not infringed. Other exceptions to the *Code's* right to equal treatment in employment include:

- where the individual cannot, because of that person's disability, perform the essential duties of the job and cannot be accommodated without undue hardship (s. 17);
- under certain circumstances, religious, philanthropic, educational, fraternal or social institutions or organizations (s. 24(1)(a)); and
- where the discrimination is for reasons of age, sex, record of offences or marital status if such a characteristic is a reasonable and *bona fide* qualification because of the nature of the employment (s. 24(1)(b)).

The *Employment Equity Act* states that conduct under these provisions is not a breach of the Act:

> 5(1). It is not a breach of this Act to give a preference in hiring or to deny employment to someone if the preference or denial is one that is permitted under the *Human Rights Code* by section 11 (constructive

discrimination), section 17 (handicap) or clause 24(1)(a) or (b) (special employment).

The Regulations, Accommodation Measures, and the Human Rights Code
(O. Reg. 390/94, s. 17(3))

The Regulations specifically refer to the *Human Rights Code* in the context of "measures to accommodate members of the designated groups who request accommodation in their employment or prospective employment." Such measures must be developed and implemented in accordance with the *Code*.

Does the Act provide for any kind of legislative review? *(s. 57)*

Yes. S. 57 says that a Committee of the Legislative Assembly must undertake a comprehensive review of the Act and the regulations within five years of s. 57 coming into force—in other words, by September 1, 1999. Within one year after beginning that review, the Committee must make recommendations to the Assembly regarding amendments to the Act and the regulations.

A similar provision has appeared in other legislation. The *Freedom of Information and Protection of Privacy Act*, for instance, required the Standing Committee on the Legislative Assembly to conduct a review of that Act.[35]

ENDNOTES

[1] The other papers—both by Elaine Campbell—are *Employment Equity, an Overview of Policies and Programs in Ontario*, Current Issue Paper 144 and *Employment Equity in Other Canadian Jurisdictions*, Current Issue Paper 146 (Toronto: Legislative Research Service, Legislative Library, 1993).

[2] S.O. 1993, c. 35.

[3] The principal sources of information on this and other aspects of the *Employment Equity Act, 1993* and the Regulations were the Act and Regulations themselves. Other sources included: Ontario, Legislative Assembly, *Compendium: Employment Equity Act, 1992*, 35th Parliament, 2nd Session, Sessional Paper No. 99, tabled 25 June 1992; Juanita Westmoreland-Traoré, "Overview of Bill 79: An Act to Provide for Employment Equity for Aboriginal People, People with Disabilities, Members of Racial Minorities and Women," in *1993 Institute of Continuing Legal Education: Proceedings of the Constitutional Section — Human Rights and Wrongs - Unravelling the Maze*, in Toronto, 28 January 1993, the Canadian Bar Association - Ontario (Toronto: Canadian Bar Association - Ontario, 1993) -- Ms. Westmoreland-Traoré is the Employment Equity Commissioner for Ontario; Cheryl J. Elliott, *Ontario's Equity Laws: A Complete Guide to Pay and Employment Equity* (Aurora: Canada Law Book, 1992); Ontario, Ministry of Citizenship, "Employment Equity in Action[:]An Overview of Ontario's Employment Equity Regulations," June 1994; and Ontario, Ministry of Citizenship, *Getting Ready[:]Preparing for Ontario's Employment Equity Act* (Toronto: The Ministry, 1994).

[4] A discussion paper released by the Office of the Employment Equity Commissioner defines systemic discrimination in the workplace as policies or practices which may be harmless in their intent, but which have a relatively greater negative effect on designated group members, and which are not really necessary to meet the requirements of the job. As an example of this kind of practice, the paper cites word-of-mouth-hiring as the main recruitment practice of an employer. It explains:

> Word-of-mouth hiring may not reach designated group members who do not know anyone in the company. When employers look for a job candidate inside their workplaces, they would not be able to hire designated group workers who are not there in the first place. . . . Racial, cultural, gender stereotypes, and stereotypes relating to disabilities may influence who will be specifically spoken to or recruited, or who will specifically be excluded. . . .

See Ontario, Office of the Employment Equity Commissioner, *Working Towards Equality: The Discussion Paper on Employment Equity Legislation* (Toronto: Queen's Printer, 1992), p. 4.

[5] Technically, the closing words of the preamble are "Therefore, Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:".

[6] Part I of the *Constitution Act, 1982* (R.S.C. 1985, Appendix II, No. 44), s. 15(2). There is some debate over the significance of "object" in s. 15(2) and whether or not the section requires an assessment of the effects of a special program, law, or activity. See, for example, Colleen Sheppard, *Litigating the Relationship between Equity and Equality*, study paper prepared for the Ontario Law Reform Commission (Toronto: The Commission, 1993), pp. 30-35; and Dale Gibson, *The Law of the Charter: Equality Rights* (Toronto: Carswell, 1990), pp. 301-303. Sheppard writes that "most judges are interpreting section 15(2) so as to require an assessment of the effectiveness, fairness, and reasonableness of a special program, law, or activity. . . . Nevertheless, the question whether the effects are to be scrutinized remains an open one . . . ." (pp. 32-33).

See also the recent decision of the Ontario Court of Appeal in *Roberts v. Ministry of Health* which involved the interpretation of the "special programs" provision in the Ontario *Human Rights Code*. Weiler J.A., who delivered the judgment of the Court, held that "special programs aimed at assisting a disadvantaged individual or group should be designed so that restrictions within that program are rationally connected to the program." [1994] O.J. No. 1732, para. 59.

[7] R.S.O. 1990, c. H.19.

[8] R.S.O. 1990, c. P.15.

[9] O. Reg. 153/91, s. 1(1).

[10] R.S.O. 1990, c. P.7.

[11] Bill 172, the *Employment Equity Act, 1990*, 2nd Sess., 34th Leg. Ont. 39 Eliz. II, 1990 (first reading 29 May 1990), s. 3(1).

[12] Ontario, Office of the Employment Equity Commissioner, *Opening Doors: A report on the Employment Equity Consultations*, rev. ed. (Toronto: Queen's Printer, 1992), pp. 18-19. The discussion paper *Working Towards Equality* of November 1991 served as the basis for the consultations.

[13] Ontario, Ministry of Citizenship, "Questions and Answers on Employment Equity," June 1994, p. 4. A one-year delay also applies to the construction industry. See ibid., p. 5 and O. Regs. 387/94 and 389/94, s. 7.

[14] O. Reg. 389/94, s. 5(1).

[15] Ontario, Ministry of Citizenship, "Highlights of Ontario's Employment Equity Regulations," June 1994, p. 3.

[16] S.O. 1993, c. 35, s. 55(2).

[17] Office of the Employment Equity Commissioner, *Opening Doors*, p. 51.

[18] Ibid. In *Working Towards Equality* the Office of the Employment Equity Commissioner pointed out that when a quota is met, the assumption is that no further

effort is needed. However, meeting a numerical goal implies not only that an objective can be reached, but also that it can be surpassed (p. 21).

[19] Bill 172, s. 3(2).

[20] Ministry of Citizenship, "An Overview of Ontario's Employment Equity Regulations," p. 14.

[21] Numerical goals, however, are not to be set for seasonal employees and seasonal job openings. O. Reg. 390/94, s. 18(4).

[22] Ministry of Citizenship, "An Overview of Ontario's Employment Equity Regulations," p. 7. A formal definition of "occupational group" is found in O. Reg. 390/94, s. 4.

[23] Ministry of Citizenship, "An Overview of Ontario's Employment Equity Regulations," p. 16.

[24] O. Reg. 153/91, ss. 5-9. There are further plan requirements in ss. 10-14 involving accountability mechanisms. S. 10, for example, states that every plan must provide for the evaluation of the performance of senior officers and senior managers in the implementation of the plan; the rewards to be offered for excellent performance; and the sanctions to be applied in the event of unsatisfactory performance.

[25] Ibid., s. 5(6). The regulation states that for each composition goal for a prescribed group, the police force must set a hiring goal. In general, the hiring goal for a prescribed group must, at a minimum, be equal to its community representation. Position goals are set by police forces that have 50 or more employees, and are based on the same principle of mirroring representation in the community.

"Community" is basically defined in the regulation as those persons between 15-64 years of age (a) in the area served by the police force; and (b) on reserves within 60 kilometres of that area. See the definition of "representation in the community" in s. 1(1).

[26] In the case of an initial plan, the certificate must state that the workforce survey and employment systems review have been completed, and that an employment equity plan has been prepared. It must also confirm that the employer has provided the information and carried out the consultations required under the Act. O. Reg. 390/94, s. 24(1).

[27] Ministry of Citizenship, "An Overview of Ontario's Employment Equity Regulations," p. 25.

[28] S.O. 1993, c. 35, s. 18(4). The Regulations also state that plans "must be posted under clause 18(1)(b) of the Act or provided or made available under subsection 18(3) of the Act to an employee." O. Reg. 390/94, s. 36(1)1.

[29] Office of the Employment Equity Commissioner, *Opening Doors*, p. 41.

[30] Ibid. In *Working Towards Equality* the Office of the Employment Equity Commissioner commented that employment equity and seniority systems could complement each other. Examples included: "plant-wide seniority, rather than

departmental seniority, portable seniority among bargaining units usually with the same employer, constructive seniority where seniority is 'built' as a remedy in cases of proven discrimination, and measures to facilitate direct entry into positions above entry level" (p. 29).

[31] Office of the Employment Equity Commissioner, *Opening Doors*, pp. 41-42. A collective agreement between Management Board of Cabinet and the Ontario Public Service Employees Union addressed the issue of seniority and employment equity as follows:

ARTICLE 4 - POSTING AND FILLING OF VACANCIES OR NEW POSITIONS

.....

4.3.1 In filling a vacancy, the Employer shall give primary consideration to qualifications and ability to perform the required duties. Where qualifications and ability are relatively equal, seniority shall be the deciding factor.

4.3.2 Notwithstanding subsection 4.3.1, the Union and the Employer may agree that employment equity shall be the overriding consideration. Such agreements will be made in advance of job postings and may be based on individual positions, groups of positions, classifications or other groupings of jobs as appropriate.

4.3.3 Agreements under subsection 4.3.2 will be based on an analysis of workforce data and employment systems indicating that a designated group is or groups are under represented.

4.3.4 It is recognized that in accordance with section 14 of the Ontario Human Rights Code, the Employer's employment equity program shall not be considered a contravention of this article.

.....

[Note: There are separate provisions in Article 4 on the assignment of an employee to a vacancy.]

Source: *Collective Agreement with respect to Working Conditions, Employee Benefits and Salaries between Management Board of Cabinet and Ontario Public Service Employees Union*, January 1, 1992 to December 31, 1993.

A collective agreement entered into by the United Steelworkers of America included the following provision:

1.08 In all cases of vacancy, promotion, transfer, layoff and recall from layoff, First Nations or native employees shall be entitled to

> preference provided they have the ability to perform the work notwithstanding their seniority.

Source: *Collective Agreement between Placer Dome Inc. Dona Lake Mine and the United Steelworkers of America on its own behalf and on behalf of its Local 8533*, August 25, 1991 to August 24, 1993. See also arts. 1.06, 1.10, and 1.14. (Note: The mine closed prior to the expiry of the agreement.)

[32] The finality of the Tribunal's orders is qualified by the supervisory power of the courts over administrative tribunals under principles of administrative law. See, for example, Elliott, *Ontario's Equity Laws*, section 22.17, "Orders of the Tribunal."

[33] Ss. 11, 17, and 24 of the *Human Rights Code* read as follows:

> 11(1) A right of a person under Part I is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,
>
> (a) the requirement, qualification or factor is reasonable and *bona fide* in the circumstances; or
>
> (b) it is declared in this Act, other than in section 17, that to discriminate because of such ground is not an infringement of a right.
>
> (2) The Commission, a board of inquiry or a court shall not find that a requirement, qualification or factor is reasonable and *bona fide* in the circumstances unless it is satisfied that the needs of the group of which the person is a member cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.
>
> (3) The Commission, a board of inquiry or a court shall consider any standards prescribed by the regulations for assessing what is undue hardship.
>
> *****
>
> 17(1) A right of a person under this Act is not infringed for the reason only that the person is incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right because of handicap.

(2) The Commission, a board of inquiry or a court shall not find a person incapable unless it is satisfied that the needs of the person cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

(3) The Commission, a board of inquiry or a court shall consider any standards prescribed by the regulations for assessing what is undue hardship.

(4) Where, after the investigation of a complaint, the Commission determines that the evidence does not warrant the appointment of a board of inquiry because of the application of subsection (1), the Commission may nevertheless use its best endeavours to effect a settlement as to the duties or requirements.

*****

24(1) The right under section 5 to equal treatment with respect to employment is not infringed where,

(a) a religious, philanthropic, educational, fraternal or social institution or organization that is primarily engaged in serving the interests of persons identified by their race, ancestry, place of origin, colour, ethnic origin, creed, sex, age, marital status or handicap employs only, or gives preference in employment to, persons similarly identified if the qualification is a reasonable and *bona fide* qualification because of the nature of the employment;

(b) the discrimination in employment is for reasons of age, sex, record of offences or marital status if the age, sex, record of offences or marital status of the applicant is a reasonable and *bona fide* qualification because of the nature of the employment;

(c) an individual person refuses to employ another for reasons of any prohibited ground of discrimination in section 5, where the primary duty of the employment is attending to the medical or personal needs of the person or of an ill child or an aged, infirm or ill spouse or other relative of the person; or

(d) an employer grants or withholds employment or advancement in employment to a person who is the spouse, child or parent of the employer or an employee.

(2) The Commission, a board of inquiry or a court shall not find that a qualification under clause (1)(b) is reasonable and *bona fide* unless it is satisfied that the circumstances of the person cannot be

> accommodated without undue hardship on the person responsible for accommodating those circumstances considering the cost, outside sources of funding, if any, and health and safety requirements, if any.
>
> (3) The Commission, a board of inquiry or a court shall consider any standards prescribed by the regulations for assessing what is undue hardship.

[34] In essence, the doctrine of constructive discrimination holds that even in the absence of an intent to discriminate, a practice or rule can be discriminatory by virtue of its effect. In general, in order to make out a case of constructive discrimination, the complainant must demonstrate that the group to which he or she belongs displays a certain characteristic and that the rule or practice adversely affects the group because of that characteristic. It is a defence that a rule or practice is reasonable and *bona fide*. This defence, however, will not succeed if the needs of the complainant's group can be accommodated without undue hardship. See Ontario, Ministry of Citizenship, Working Group on Employment Equity, *Impact of the Ontario Human Rights Code* (1989), pp. 1-16.

[35] R.S.O. 1990, c. F.31, s. 68. The section read:

> The Standing Committee on the Legislative Assembly shall, on or before the 1st day of January, 1991, undertake a comprehensive review of this Act and shall, within one year after beginning that review, make recommendations to the Legislative Assembly regarding amendments to this Act.

Three differences between s. 68 and s. 57 of the *Employment Equity Act* are: the review of the *Freedom of Information Act* had to commence within three years of the Act coming into force; a specific Committee of the Assembly was mandated to conduct that review; and s. 68 made no reference to the regulations.